IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

FRIDAY, THE 1ST DECEMBER 2006 / 10TH AGRAHAYANA 1928

WP(C).No. 35935 of 2005(C)

STO.601/2005 of C.J.M.,KOTTAYAM
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PETITIONER:

BABY MATHEW, S/O. A.J. MATHEW,
MANAGING DIRECTOR, SOMASTHEERAM AYURVEDIC
BEACH RESORT PVT.LTD., CHOVARA P.O.,
THIRUVANANTHAPURAM.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.PRAVEEN K. JOY
SRI.V.GIRI

RESPONDENTS:
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1. STATE OF KERALA, REP. BY SECRETARY
(HOME DEPARTMENT), SECRETARIAT,
THIRUVANANTHAPURAM.

2. COMMISSIONER OF POLICE,
THIRUVANANTHAPURAM.

3. SUB INSPECTOR OF POLICE,
VIZHINJAM POLICE STATION.

4. TOMY MATHEW, AGED 49,
S/O. A.J. MATHEW, ARAMBANKUDY HOUSE,
NEAR CST CHURCH, KOZHIPILLY JUNCTION
KUTHUKUZHIKARA, KOTHAMANGALAM VILLAGE.

5. JOHNY MATHEW, S/O. A.J. MATHEW,
ARAMBANKUDY HOUSE, NADUKANI,
KOTHAMANGALAM VILLAGE.

6. SONY ELDHO, S/O. ELDHO,
KULAPURAM HOUSE, KOTHAMANGALAM P.O.,
ERNAKULAM.

7. P.R. THOMAS, PUTHUKUDIYIL HOUSE,
VAIPOOR P.O., MALLAPPILLY,
PATHANAMTHITTA DISTRICT.

**8. K.J. GEORGE, KUZHIKANNIYIL HOUSE,
KUTHUKUZHI P.O., KOTHAMANGALAM P.O.,
ERNAKULAM.**

**9. JOSE, S/O. VARKEY, ARAKKAL HOUSE,
KOZHIPPILLY, KOTHAMANGALAM P.O.,
ERNAKULAM.**

**10. BABY, S/O. JOSEPH, PULLICKAL HOUSE,
MATHIRAPPILLY, KOTHAMANGALAM P.O.,
ERNAKULAM.**

**BY ADV. SRI.M.V.SABU
SRI.ALEXANDER JOSEPH
SRI.T.ANUP JOACHIM
SRI.ALEXANDER JOSEPH
PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED**

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/12/2006, ALONG WITH W.P.(C) NO.30110 OF 2006 CRMC NO. 1677 OF 2006 CRMC NO. 1051 OF 2006 CRMC NO. 4498 OF 2005 CRMC NO. 4209 OF 2005 CRRP NO. 3448 OF 2005 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

Ext.P1: The true photocopy of the complaint dated Nil submitted by the petitioner before the Sub-Inspector of Police Vizhinjam, the 3rd respondent

Ext.P2: The true photocopy of the complaint dated Nil submitted by the 5th respondent on beahls of M/s Somatheeram before the 3rd respondent

Ext.P3: The true photocopy of the FIR No.263/2004 dated 6-10-2004 of Vizhinjam police station

Ext.P4 The true photocopy of the FIR No.282/2004 dated 21-10-2004 of Vizhinjam Police Station

Ext.P5: The true photocopy of the final report dated 6-10-2004 inCrime No.263/2004 of Vizhinjam Police Station

Ext.P6: The true photocopy of the petition dated 28-11-2005 submitted by the petitioner

Ext.P7: The true photocopy of the order dated 29-11-2005 issued by the 2nd respondent

Ext.P8: The true photocopy of the board resolution dated 5-12-2005 of the petitioner company.

Ext.P9 The true photocopy of the compounding order dated 1-12-2005 in C.C. 274/2005 before the JFCM Court No.II Neyyattinkara

Ext.P10 The true photocopy of the complaint dated 13-12-2005 submitted by the petitioner

Ext.P11: The true photocopy of the F.I.R No.358/2005 dated 14-12-2005 of Vizhinjam Police Station

Ext.P12 The true photocopy of the receipt dated 13-12-2005 of the office of the 2nd respondent

ExtP13: The true photocopy of the complaint in S.T. No.601/2005 of Chief

Judicial Magistrate Court Kottayam

Ext.P14 The true photocopy of the complaint dated 6-10-2004 in S.T. No.1001/2005 of Judicial First Class Magistrate Court Kothamangalam

Ext.P15 The true photocopy of the counter affidavit in O.S No. 101/2005 dated 23-11-2005 before Sub-Court Muvattupuzha.

RESPODNENTS'S EXHIBITS

Ext.R7(a) : True copy of the order dated 7-10-2004 in C.P. No.40/2004 of the Company Law Board Chennai

Ext.R7 (b) True copy of the Order dated 17-12-2004

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R.BASANT.J

W.P.(C) No. 35935 OF 2005
&
W.P.(C) No.30110 OF 2006
&
Crl.R.P. No.3448 OF 2005
&
Crl.M.C. Nos.4209 & 4498 OF 2005
&
Crl.M.C. Nos1677 & 1051 OF 2006

Dated this the 1st day of December 2006

ORDER

All these petitions are taken up for disposal together as the crux of the disputes centers around the same theme. Crl.M.C Nos. 4209/2005, 4498/2005, 1051 /2005, 1677/2006 are are filed by one Baby Mathew the Managing Director of Somatheeram Ayurvedic Beach Resorts Private Limited and the said company. The company as well as the said Baby Mathew face indictment in 4 separate prosecutions under Section 138 of the Negotiable Instruments Act before the following courts.

(i) C.C. No. 601/2005 before the C.J.M, Kottayam

(ii) S.T No 1001 /2005 before the J.F.M.C Kothamangalam

(iii) S.T. No.233/2006 before the J.F.M.C.-II Kanjirappally

(iv) S.T No. 95/2006 before the J.F.M.C-II Kanjirappally

2. The short identical prayer in these Crl., M.Cs is that the

prosecutions under section 138 of the N.I.Act may be quashed. The crux of the contention raised by the accused in defence is that the cheques in question have been forged by one Tomy Mathew the brother of the said Baby Mathew in collusion with one Johny Mathew another brother of the said Baby Mathew. Johny Mathew is said to be the former Joint Managing Director of the Company. Tomy Mathew is also alleged to be a director of the company who was earlier looking after the accounts and audit of the company. Identical defence is set up in all the four prosecutions under Section 138 of the N.I Act that the said Johny Mathew and Tomy Mathew in collusion with the respective complainants have initiated the unjustified prosecutions. That at least is the submission before me.

3. Writ Petition 30110/2006 is filed by the complainant in C.C. 601/2005 referred above and the short prayer in that writ petition is that there may be early disposal of the prosecution initiated by him.

4. Crl.R.P. 3448/2005 is filed by an employee of the said company of which Baby Mathew is the Managing Director and in that Crl.R.P. the grievance is that proceedings in C.C. 274/2005 pending before the Judicial First Class Magistrate Court-II Neyyattinkara, in which the said Tomy Mathew is the sole accused has been unfairly and improperly terminated holding that the offence has been compounded. The petitioner in

that Crl.R.P. is a top ranking official of the company and is also a witness cited by the prosecution in that case. That prosecution was initiated on the basis of the complaint filed by Johny Mathew the then joint Managing Director on behalf of the company making allegations against Tomy Mathew his brother and director of the company. The said crime was investigated. Final report was filed by the police. Cognizance was taken of the offence punishable under Section 420 of the Cr.P.C.

5. While the said prosecution was pending an application was filed by Baby Mathew the Managing Partner before the Commissioner of Police Trivandrum and the Commissioner of Police by Ext.P7 order dated 28-11-2005 (all references to exhibits are as shown in W.P.(C) 35935/2005) had directed further investigation to be held under section 173 (8) of the Cr.P.C

6. While that order was in force Johny Mathew the joint Managing Director had filed an application for composition jointly along with accused Tomy Mathew, and by the order impugned in Crl.M.C. 3448/2005 composition was accepted and proceedings were terminated as per order dated 1-12-2005. The contention of the petitioner in the Crl.M.C 3448/2005 is that it was a fraudulent composition at the back of the

company and its Managing Director Baby Mathew. Johny Mathew had been removed from the position as Joint Managing Director with effect from 31-3-2005. It is contended that on the date of the application for composition and at the time of acceptance of the composition, the said Johny Mathew was not the joint Managing Director and consequently he did not have the requisite competence to represent the company and compound the offence.

7. We are now left with the Writ Petition 35935/2005. After the composition which is challenged in Crl.R.P 3448/2005 Baby Mathew appears to have filed a fresh complaint before the Commissioner of Police (Copy of that complaint is produced as Ext.P10) dated 13-12-2005 against Johny Mathew, Tomy Mathew and the four complainants in the prosecutions under section 138 of the Negotiable Instruments Act referred above.A crime was registered Ext.P11 is the F.I.R. Crime No. 358/2005 of Vizhinjam Police Station was thus registered for offences punishable under Sections 381 , 406, 418, 420 468 120(b) r/w 149 of the I.P.C . Investigation into that complaint is in progress. The petitioner Baby Mathew has filed W.P.(C) No.35935/2005 with the prayer that directions may be issued to get the investigation conducted by the Crime Branch Police.

8. This is the factual matrix and the nature of challenge in these seven proceedings.

9. I shall first of all consider Crl.R.P. 3448/2005. It is alleged that Johny Mathew was removed from his position as Joint Managing Director long prior to the application for composition. I shall not enter into the controversy on that aspect in the present proceedings. But the composition could only have been effected by the company and not by any officer , official or office-bearer of the company undoubtedly unless he was duly authorised. There is no contention even before me that the company had taken any decision to compound the offence. The alleged composition by the said Johny Mathew must in these circumstances be certainly held to be incompetent and improper in as much as the company which is the person aggrieved as per column 3 of Section 320 of the Cr.P.C has not compounded the offence. Crl.R.P. 3448/2005 therefore deserves to be allowed.

10. Once that is allowed, certainly we come to the prayer for further investigation which has been ordered as per Ext.P7 under Section 173 (8)of the Cr.P.C. That investigation will certainly have to proceed

now. Incidental direction, to that effect though not specifically prayed for, can also be granted.

11. If further investigation is directed into the Crime No.263/2004 which culminated in C.C. 274/2004 I find absolutely no justification in a separate crime under Ext P11 (Cr.No.358/2005) continuing now. Of course no relief has been sought by anyone for consolidation of that Crime with the further investigation in Cr.No.263/2004 and it is for the investigating Officer in that crime to consolidate the further investigation under Section 173 (8) of the Cr.P.C in Cr. No. 263/2004 under Ext.P7 and the Investigation into Crime No. 358/2005 of Vizhinjam Police Station. I am in agreement with the learned counsel for the petitioner that effective expeditious investigation must be conducted in the matter. I am satisfied that it is not necessary to direct any other agency to take over the investigation. It is sufficient if the Commissioner of police (the second respondent) is directed to effectively monitor the investigation in Cr.No.358/2005 and further investigation in Cr.No.263/2004 after consolidation and ensure justice.

12. Coming to the four Crl.M.Cs. referred above the prayer is that the prosecution under Section 138 of the N.I.Act may be quashed. As

against the continuation of those prosecutions, the only contention is that the investigation/ further investigation referred above is pending. I must alertly note that prior to charge sheeting of Cr.No. 263/2004 no allegations whatsoever were raised against the complainants in the four prosecutions under Section 138 of the N.I.Act. According to me it may not be just or proper now to direct that the prosecution be quashed or kept in abeyance indefinitely till the further investigation/ investigation into the Cr.Nos.263/2004 and 358/2005 are over. At any rate there can be no joint trial. The defence which the accused Baby Mathew wants to raise will have to be established separately in the four prosecutions even assuming that further charge sheet were filed after investigation/ further investigation against all accused persons including the complainants. In the peculiar circumstances of this case I am of opinion that it is not necessary to quash the proceedings or even to direct that the 138 prosecutions must be kept in abeyance till the investigation/further investigation is completed. The Crl. M.C.s do not in these circumstances deserve to be quashed. I may hasten to observe that I have not intended to express any opinion on the sustainability of the prosecutions or on the acceptability of the defences which Baby Mathew wants to urge in the four prosecutions. He will be entitled to urge all his contentions and substantiate the same and the dismissal of the Crl.M.C.s. and observations made in this common order

will not in any way fetter the rights of the said Baby Mathew to raise appropriate contentions, in the said prosecutions

13. It follows that Writ Petition 30110/2006 can be allowed and the learned Magistrate can be directed to dispose of C.C. 601/2005 expeditiously

14. Finally it is said that it will be conversant to all concerned if this Court will direct that all the four prosecutions under Section 138 are tried by the same Court. Both sides make that request, though of course there is a dispute as to where the trials ought to he held. I consider the joint request made for a direction that all the four cases be disposed of by the same Court to be totally justified. I take the view that the trial can be directed to be held by the Chief Judicial Magistrate Kottayam before whom C.C. 601/2005 is pending. Two other cases are also pending before Courts in the Sessions Division of Kottayam.

15. I have heard all the counsel. The same counsel appears for the complainant in all the four Criminal prosecutions and the said Johny Mathew. Tomy Mathew has been served, but has not appeared before this court.

16. The learned counsel for the accused Baby Mathew submits that great prejudice hardship loss and inconvenience will be suffered by Baby Mathew if his personal appearance were insisted before the Court at Kottayam on all dates of posting. It is for the petitioner to apply for exemption and if there are sufficient grounds, I find no reason to assume that the learned Magistrate would not consider such application in accordance with law on merits and expeditiously. It has often been repeated that unnecessary ritualistic insistence on the personal presence of the accused on all dates of posting need not be made by a Criminal Court, unless such appearance be necessary for the further progress of the case, no special or specific directions do appear to be necessary on this aspect.

17. The learned counsel for the complainants in the prosecutions under Section 138 of the N.I.Act prays that there may be a direction for expeditious disposal of the four cases. I do not want to prescribe any time limit, but I direct that the learned Chief Judicial Magistrate Kottayam must make every endeavour to expeditiously dispose of all the four cases.

18. In the result;

(a) Writ petition 30110/206 is allowed . Early disposal of the case filed by

the petitioner/ complainant, shall be made.

(b) Crl.M.C. 3448/2005 is allowed. The composition is set aside. The learned Magistrate shall dispose of C.C. 274/2005 afresh in accordance with law.

(c) Crl.M.C. Nos.4209 & 4498 of 2005 and Crl.M.C. Nos1677 & 1051 of 2006 are all dismissed. But it is directed that all the four cases shall be disposed of the Chief Judicial Magistrate Kottayam . The courts concerned shall forthwith forward the records to the learned Chief Judicial Magistrate Kottyam,. The Parties shall appears before learned Chief Judicial Magistrate Kottayam on 2-1-2007.

(d)Writ petition 35935/2005 is allowed in part and the second respondent is directed to ensure that the further investigation in C.C. 274/2004 and the investigation in Crime No.358/2005 referred above are conducted properly and completed expeditiously

R.BASANT, JUDGE

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